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Paper 61  
ENTERED: 23 February 2010

UNITED STATES PATENT AND TRADEMARK OFFICE  
BOARD OF PATENT APPEALS AND INTERFERENCES

Patent Interference No. 105,489

BAYER HEALTHCARE LLC  
(5,124,246),  
Junior Party,  
v.  
ENZO LIFE SCIENCES, INC.  
(08/479,995),  
Senior Party.

Before: RICHARD E. SCHAFER, RICHARD TORCZON, and MICHAEL  
P. TIERNEY, *Administrative Patent Judges*.

TORCZON, *Administrative Patent Judge*.

JUDGMENT  
Bd.R. 127

NOTICE: "Any agreement or understanding between parties to an interference, including any collateral agreements referred to therein, made in connection with or in contemplation of the termination of the interference, shall be in writing and a true copy thereof filed in the Patent and Trademark Office before the termination of the interference as between the said parties to the agreement or understanding." 35 U.S.C. 135(c); see also Bd.R. 205 (settlement agreements).

The parties were authorized to file various motions, including priority motions.<sup>1</sup> While each party filed a priority statement, the priority statement of the junior party (Bayer)<sup>2</sup> did not antedate the accorded benefit date of the senior party (Enzo).<sup>3</sup> Neither party filed a motion for judgment on priority.

The parties are presumed to have invented in the interfering subject matter in the order of their accorded benefit.<sup>4</sup> Consequently, a junior party that fails to present a priority case also fails to overcome the presumption that it will lose on priority.<sup>5</sup>

In the present case, Bayer had two opportunities to overcome the presumption. It could have prevailed on a threshold motion or it could have prevailed on priority. Bayer did not prevail on its threshold motions.<sup>6</sup> Since Bayer did not file a priority motion, it cannot prevail on priority either. Consequently, the case is ripe for judgment.

### ORDER

ORDERED that judgment be entered against junior party Bayer for count 1, the sole count;<sup>7</sup>

FURTHER ORDERED that claims 39-41 and 43-56 of Bayer's involved 5,124,246 patent be CANCELED;<sup>8</sup> and

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<sup>1</sup> Paper 22.

<sup>2</sup> Paper 30.

<sup>3</sup> Paper 1 (Declaration) at 4.

<sup>4</sup> Bd.R. 207(a)(1).

<sup>5</sup> Cf. Bd.R. 204(a)(3) (order to show cause where junior party fails to file an adequate priority statement).

<sup>6</sup> Paper 60 (Decision on Motions).

<sup>7</sup> Paper 1.

<sup>8</sup> 35 U.S.C. 135(a).

The Board will place a copy of this judgment in the administrative records of the involved patent and the involved application.

cc:

Matthew I. Kreeger and Parisa Jorjani, MORRISON & FOERSTER, of Palo Alto, California, for Bayer HealthCare LLC.

Robert M. Schulman, HUNTON & WILLIAMS, LLP, of Washington, D.C., for Enzo Life Sciences, Inc.; with Eugene C. Rzucidlo, of New York City, New York.